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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JERRY DEAN McCOY, Petitioner.	2 CA-CR 2008-0088-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044538

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Judge.

¶1 In this petition for review, Jerry Dean McCoy challenges the trial court's denial of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.

We will not disturb that ruling unless we find the court clearly abused its discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶2 Following a bench trial in March 2006, McCoy was convicted of three counts of kidnapping, three counts of aggravated assault with a deadly weapon, and one count each of first-degree burglary, aggravated robbery, and armed robbery. The crimes occurred during a November 2004 home invasion he and three other individuals committed. The trial court sentenced McCoy to concurrent terms of imprisonment on all nine counts, the five longest for twenty-one years. We affirmed his convictions and sentences on appeal. *State v. McCoy*, No. 2 CA-CR 2006-0183 (memorandum decision filed Mar. 30, 2007).

¶3 In April 2007, McCoy filed a pro se notice of and petition for post-conviction relief alleging a claim of ineffective assistance of trial counsel. The court appointed counsel, who filed a further petition for post-conviction relief in August 2007. In it, McCoy alleged trial counsel had been ineffective in two respects—first, in failing to request a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), to determine whether the circumstances attending the pretrial identification of McCoy by one or more of the victims had been unduly suggestive, tainting their subsequent in-court identifications; and, second, in failing to cross-examine effectively two of the victims to determine if the state had provided any incentives for them to testify against McCoy.[1]

[1]Two of the four adult victims present in the house during the home invasion were a couple, Fausto C. and Myrna V. McCoy alleged Fausto was a Mexican citizen with "ties to the drug trade" who had been in the United States illegally when the crimes occurred. According to McCoy, in December 2005 his trial was postponed for four months due to the unavailability of "one of the State's witnesses"—presumably Fausto. When "the State

¶4 After the state had filed a response to McCoy's petition, the trial court denied relief, explaining its reasoning in a two-page, minute entry ruling. It found the "decision to request a *Dess*[*u*]*reault* hearing is purely a tactical one" because the result could be either favorable or harmful to the defense. It thus rejected the notion that the failure to request such a hearing is ineffective assistance per se and found McCoy had not supplied the affidavit of any legal expert or otherwise shown that counsel's inaction had been anything other than strategic. It also implicitly found McCoy had failed to support his bare assertion that counsel should have cross-examined the victims more pointedly; McCoy offered nothing beyond speculation that the victims had, in fact, received some inducement to appear and testify.

¶5 To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984); *see also Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶6 The trial court concluded McCoy had satisfied neither of *Strickland*'s requirements. First, it found he had not presented a colorable claim that trial counsel had

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managed to secure the witness and his common-law wife to testify at the reset trial" in March 2006, McCoy contended, defense counsel should have investigated or cross-examined them to determine "why or how the witnesses' presence was accomplished."

fallen below the prevailing standard of care by failing to request a *Dessureault* hearing or by failing to "cross-examine witnesses as to how their presence was secured for trial." Nor, the court found, had McCoy established *Strickland*'s prejudice element with respect to either of his assertions. In effect, the court concluded McCoy had failed to show that, had a *Dessureault* hearing been held, it would have established that the circumstances surrounding one victim's out-of-court identification of McCoy had been unduly suggestive and had tainted her subsequent in-court identification at trial. Similarly, the court found, McCoy had not shown "that a different tactic in the cross-examination of witnesses would have altered the ultimate verdict in this case. Such claims call for nothing less than pure speculation and conjecture."

¶7 We agree with the trial court's assessment. Because one of the occupants of the house had managed to escape undetected and call law enforcement from a neighbor's home, a sheriff's deputy had arrived in time to see four men leaving the house. One was captured at the scene, but the three others ran away. Another deputy driving in the vicinity saw and stopped McCoy, who matched a physical description supplied by the deputy who had observed the assailants' departure. Not only was McCoy identified in person by at least one of the victims shortly after the event but, when detained, he was also in possession of a number of gold bracelets the same victim identified as having been taken from her wrist during the robbery. Thus, regardless of McCoy's contentions about the need for a *Dessureault* hearing or the victims' possibly having received some inducement to appear and testify at trial, there was substantial other evidence of McCoy's guilt.

¶8 In substance, McCoy's petition for review is virtually identical to the petition for post-conviction relief he filed below. He has presented no additional argument or authority to demonstrate that the trial court erred in concluding he had not established either deficient performance by trial counsel or resulting prejudice and thus satisfied neither element of the two-part *Strickland* test. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Because we are satisfied with the trial court's identification, analysis, and resolution of McCoy's ineffective assistance claims, and because, on this record, the court was not required to hold an evidentiary hearing on these claims, we adopt its ruling without further elaboration. *See generally State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court['s] rehashing the trial court's correct ruling in a written decision"). Consequently, although we grant the petition for review, we find no abuse of the trial court's discretion and therefore deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge